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No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,

Respondents.

BRIEF OF RESPONDENTS BRENDA B. BECKER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Statute, which grants a taxpayer a deduction on his state tax return, up to a certain maximum, for amounts he has paid to others for tuition, textbooks and transportation for dependents attending elementary or secondary schools, either public or nonpublic, in any way violate the Establishment Clause of the First Amendment?

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OPINIONS BELOW

The District Court Opinion is reported at 514 F. Supp. 998. The opinion of the Court of Appeals for the Eighth Circuit is reported at 676 F.2d 1195 and is reproduced in the Appendix to the Petition, A-1 through A-55.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §1254 (1) to review a judgment of the United States Court of Appeals for the Eighth Circuit, made and entered on April 30, 1982.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, or to petition the government for a redress of grievances."

STATUTE INVOLVED

The statute here involved is an integral part of the Minnesota State income tax laws set forth in Minnesota Statutes, Chapter 290. The law allows certain deductions from gross income to be made in determining net income which is then subject to tax. One of those deductions is found at Minnesota Statutes Chapter 290.09, Subd. 22. It allows a deduction for:

> "Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident

of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenents, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is an action challenging a Minnesota state income tax provision, Minn. Stat. §290.09 (22), as being violative of the First Amendment, as applied to the states through the Fourteenth Amendment. The respondents consist of the Minnesota Commissioner of Revenue, together with two groups of taxpayers who have children in various nonpublic schools, some of which are religiously affiliated and some which are not. These respondents have a personal stake in the outcome of this litigation in that they have claimed this limited deduction in prior years and intend to claim it in the future, if they properly qualify.

It is important to realize the indirect and remote nature of the benefits provided. The statute is neutral on its face, providing indirect benefits to *taxpayers* whose dependents attend any qualified school, public or nonpublic, religiously affiliated or not. There is no direct grant or payment from the state to the school, to the pupil or even to the taxpayer. Rather, an indirect benefit is accorded the taxpayer in the nature of an abstention from taxation. This is identical to tax deductions provided taxpayers under other statutes. Further, there is no payment of money by the state if taxable income is not present; this is not a tax credit with a mechanism for direct grant or payment in the absence of taxable income.

Not only is the payment indirect, but it is *remote*. The taxpayer must meet the following conditions to realize a benefit from this statute:

1. He must first pay others for tuition, transportation or textbooks for a dependent.
2. He may only claim a deduction for amounts up to $500 or $700 per dependent, depending upon the grade level.
3. He must *itemize* deductions (i.e., no benefit would be present for someone only claiming the standard deduction).
4. He must have a taxable net income, considering all other allowable deductions.
5. The deduction and resulting net income subject to tax must cause his income to be in a lower bracket or a lower table as set forth in Minn. Stat. §290.09, Subd. 2(c).

Quite important also is the *breadth* of the statute. It applies to taxpayers who have dependents attending *either*

public or nonpublic schools. While tuition is normally not charged to public school parents, there are cases of inter-district education where tuition is charged and hence subject to this deduction. And, the deduction is allowable for such things as private tutoring, driver's education which is part of a graduation requirement, Montessori tuition and miscellaneous expenditures, such as the rental of band instruments or physical education requirements. These amounts paid by public school parents are not insignificant. Tuition revenues received by public schools totaled over $2 million in 1978 and 1979. *See,* affidavit of Ronald Moir. Further, fees from "patrons" that a school may charge under Minn. Stat. §120.71 to §120.76 for miscellaneous items totaled $907,000.

Lastly, it is important to realize the *history* of the statute. The predecessor to this statute, Minn. Laws 1955, Chapter 741, was enacted in 1955 and provided for a deduction for tuition and transportation expenses paid to others, to a maximum of $200. The statute was in effect for 1955 and many subsequent years without any constitutional challenge.

The law was amended in 1976 to increase the deduction to $500 or $700, depending on the child's grade level. Also qualifying for the deduction was an expenditure for textbooks, excluding religious textbooks or instructional materials. In addition, "school" was defined to include only those places where a child could fulfill compulsory attendance requirements and where civil rights laws were observed. *See,* Minn. Laws, 1976, Chapter 37.

This law as amended was then subject to a federal constitutional challenge. A Three Judge Panel was convened and ultimately issued a decision in favor of the validity of the law. *See, Minnesota Civil Liberties Union, et al. v. Roemer, et al.,* 452 F.Supp. 1316 (D. Minn. 1978). Although a direct appeal to this Court was then allowable, no appeal was undertaken.

Petitioners then commenced this action in 1980, repeating the same basic challenge as in 1976, but arguing that certain facts could be discovered which were not available in 1976, which facts would show the infirmity of the law. After discovery, cross motions for summary judgment were filed. District Judge Renner upheld the state. *See*, opinion, A-56 through A-84.

The appeal followed to the Eighth Circuit, which upheld the statute, and petitioners further are here petitioning for review by this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The history of the statute indicates acceptance by both the public, the Minnesota legislature and the courts over a long course of years.

As determined above, this statute was enacted in 1955 and went unchallenged until shortly after the 1976 amendment increasing the deduction. The wisdom of the deduction was thus before the public and the state legislature for many years. In addition, many important First Amendment decisions were issued by this Court dealing with various types of aids to nonpublic schools. While *Everson v. Board of Education*, 330 U.S. 1 (1947) preceded the law, cases such as *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) and *Meek v. Pittenger*, 421 U.S. 349 (1975) were all decided in the period 1955 to 1976. Most of these cases invalidated various types of assistance to nonpublic schools or the parents. Despite this, the Minnesota law remained in effect and without challenge. Such a history strongly indicates

that the statute meets the three-pronged test set forth in *Lemon v. Kurtzman, supra.*

Further, this history of acceptance, while certainly not as long, can be favorably compared to the history of acceptance of tax exemption for real property upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1970).

Finally, it is apparent that this statute has been reviewed by (1) A Three-Judge Federal Court; (2) A single Federal Judge and (3) The Court of Appeals for the Eighth Circuit. Each of these courts has found in favor of the validity of this law. While other possibly contrary decisions were being handed down elsewhere, in particular *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), the Minnesota courts either distinguished them or said they were in error. The consistency of the decisions interpreting this Minnesota Statute is noteworthy.

2. The statute is neutral on its face and as applied.

The clear *purpose* of this Act is secular. If a parent makes monetary expenditures for his or her child's education, such expenditures are for the good of the child, the good of the parent-child relationship and the good of society, which seeks educated persons. This could not possibly be questioned for public school parents. Neither should it be questioned for non-public school parents, who are paying for their childrens' secular education as well as, in some cases, providing an element of religious instruction.

The simple fact here is that this statute benefits this broad class of parents, regardless of where their children may attend school or whether the school is religiously affiliated or not. As Judge Renner said:

> The defendants have shown that the statute provides widely distributed tax relief. Such relief is available to all parents with dependents attending elementary and secondary schools. This is a critical element since a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only incidentally and indirectly. *Walz*, 397 U.S. at 672-76.
> A-77-88.

In short, the legislature has recognized the constitutional right of parents to educate their children in nonpublic schools, and has accorded both public and nonpublic school parents a tax deduction for some of the expenditures relating to that education.

3. The statute does not encourage or reward parents who send their children to nonpublic schools; the primary effect does not advance religious beliefs.

Petitioners attempt to bring this case within the "encouragement and reward" language of *Nyquist*. However, the statutes are clearly different. In *Nyquist*, the statute allowed a direct tuition reimbursement for certain parents and a "tax credit" for others, depending on income levels. However, the amount of the credit was not related to the amount in fact spent for tuition but was a set amount. Under either formula, the parent received a fixed amount not necessarily related to the amount of tuition. It was this factor which caused the court to characterize the statute as an encouragement or reward for sending children to nonpublic schools. *See*, 413 U.S. at 790-791.

In essence, the *Nyquist* case voided any indirect payment mechanism which could not be viewed as a true tax deduction.

Here, this is a true tax deduction, similar to those provided other persons or classes who are deemed worthy of tax relief for some reason. Indeed, the deduction is similar to that provided a taxpayer who makes a contribution to a charity, including a religious charity. As a true tax deduction, any benefit flowing to a school or a religion is so remote and incidental that the deduction could not violate the separation of church and state.

Petitioner's "reward" argument should also be viewed in an historical context. It was addressed as early as *Walz v. Tax Commission, supra,* where in a concurring opinion, Justice Harlan set forth a dual test of *voluntarism* and *neutrality*. The essence of voluntarism is that the statute should neither encourage or discourage participation in religious life. If it does not, the voluntarism requirement is met.

This statute clearly does not encourage participation in religious life; it operates only as a deduction to a broad class of persons who are making expenditures to further the education of their children.

4. There is no serious split in the Circuits to compel review.

Petitioners make much of the apparent conflict between the decision below and *Norberg, supra.* A number of comments can be made. First, *Norberg* itself distinguished the prior case of *MCLU v. Roemer, supra,* a distinction which the Eighth Circuit found "somewhat dubious". *See,* A-25. In essence the Eighth Circuit found that *Roemer* should have been accorded greater weight by the *Norberg* court. Because *Roemer* was a Three-Judge Court decision, it should be ac-

corded almost as much weight as a decision by an appeals court. In short, *Norberg* is a minority opinion.

Second, based on facts developed in this case, the benefit to public school parents and parents of children attending non-sectarian private schools is not insignificant. As the Eighth Circuit said, ". . . we find that there are substantial benefits following to all members of the public." A-52. Thus while the statute may be identical, the factual underpinnings of the statute are different.

Third, it might be more prudent to await further Circuit court opinions in this delicate area before deciding to grant review.

CONCLUSION

The purpose of this statute is to grant limited relief to parents of elementary and secondary school children in these highly inflationary times. Relief is accorded to sectarian school parents, but it is also accorded to public school parents and to parents of children in nonpublic, non-sectarian schools. The relief is indirect and remote, *Walz v. Tax Commission, supra*, and simply cannot be said to cause the advancement of religious teaching or activity. It is neutral both on its face and as applied. The statute does not in any way violate the Establishment Clause of the First Amendment. The petition should be denied.

Respectfully submitted,

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